

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

11 WILLIE STEWART, JR.,

12 Petitioner,

13 v.

14 JAMES YATES, Warden,

15 Respondent.

Civil No. 08cv1177-BTM (NLS)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas  
17 Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to  
18 move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either  
19 paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the  
20 case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed  
21 with this case, he must submit, **no later than September 15, 2008**, a copy of this Order with the  
22 \$5.00 fee or with adequate proof of his inability to pay the fee.

23 In addition, in accordance with Rule 4 of the rules governing § 2254 cases, the Petition  
24 is also subject to dismissal because Petitioner has failed to allege that his state court conviction  
25 or sentence violates the Constitution of the United States. Title 28, United States Code,  
26 § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

27 The Supreme Court, a Justice thereof, a circuit judge, or a district  
28 court shall entertain an application for a writ of habeas corpus in  
behalf of a person in custody pursuant to the judgment of a State

court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

3 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
4 1991); Mannholt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800  
5 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
6 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
7 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the

8 United States.” See 28 U.S.C. § 2254(a).

9       Here, Petitioner claims that the trial court applied state sentencing guidelines incorrectly  
10 when it imposed a restitution fine that he has little chance of paying. (Pet. at 4.) In no way does  
11 Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United  
12 States.” 28 U.S.C. § 2254.

13       Further, the Court notes that Petitioner may not simply be able to amend his Petition to  
14 state a federal habeas claim and then refile the amended petition in this case. He must exhaust  
15 state judicial remedies before bringing his claims via federal habeas. Habeas petitioners who  
16 wish to challenge either their state court conviction or the length of their confinement in state  
17 prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer,  
18 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must  
19 present the California Supreme Court with a fair opportunity to rule on the merits of every issue  
20 raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at  
21 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state  
22 court, how one or more of his or her federal rights have been violated. The Supreme Court in  
23 Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity  
24 to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact  
25 that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66  
26 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary  
27 ruling at a state court trial denied him [or her] the due process of law guaranteed by the  
28 Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.”

1 *Id.* at 366 (emphasis added). If Petitioner has raised his claim in the California Supreme Court  
2 as a federal claim he must so specify. The burden of proving that a claim has been exhausted  
3 lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir.1981).

4       Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
5       Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
6       of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
7       limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

<sup>17</sup> 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

18        The statute of limitations does not run while a properly filed state habeas corpus petition  
19 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
20 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
21 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
22 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
23 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
24 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

25 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
26 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that  
27 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.  
28 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas

1 relief because he has not stated a cognizable federal claim and has not alleged exhaustion of state  
2 court remedies as to any cognizable federal claim.

3 If Petitioner wishes to proceed with this case, he must, **no later than September 15,**  
4 **2008**, satisfy the filing fee requirement **and** file a First Amended Petition which cures the  
5 pleading defects identified in this Order. The Clerk of Court shall send a blank Southern District  
6 of California In Forma Pauperis Application and a blank Southern District of California  
7 amended petition form to Petitioner along with a copy of this Order.

8 **IT IS SO ORDERED.**

9  
10 DATED: July 9, 2008

11   
12 Honorable Barry Ted Moskowitz  
13 United States District Judge

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28